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No. 04-1581

In the Supreme Court of the United States

WISCONSIN RIGHT TO LIFE, INC., APPELLANT

v.

FEDERAL ELECTION COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEE

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QUESTION PRESENTED

Whether the three-judge district court correctly rejected appellant's as-applied constitutional challenge to the federal prohibition on the use of corporate treasury funds to finance "electioneering communications."

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The opinion and order of the district court dismissing appellant's complaint (J.S. App. 1a-3a) is unreported. A prior opinion of the district court denying appellant's request for preliminary injunctive relief (J.S. App. 4a-12a) is unreported.

JURISDICTION

The judgment of the district court was entered on May 10, 2005. A notice of appeal was filed on May 12, 2005, and was docketed on May 25, 2005. The jurisdictional statement was filed on May 23, 2005. This Court noted probable jurisdiction on September 27, 2005. The jurisdiction of this Court rests on 28 U.S.C. 1253 and on the Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 403(a)(3), 116 Stat. 114.

STATEMENT

This case concerns a provision of the Bipartisan Campaign Reform Act of 2002 (BCRA or Act), Pub. L. No. 107-155, § 203, 116 Stat. 81, 91-92, that prohibits corporations from using their general treasury funds to pay for any communication—an "electioneering communication" in the terminology of the Act—that refers to a candidate for federal office and is broadcast within 30 days of a federal primary election or 60 days of a federal general election in the jurisdiction in which that candidate is running. BCRA § 203, 2 U.S.C. 441b(b)(2) (Supp. II 2002). Just two Terms ago, this Court sustained BCRA § 203 against a facial challenge and held that the primary definition of "electioneering communication" set forth in BCRA § 201(a)—which, the Court recognized, has a degree of prophylaxis—is constitutional in "all applications." *McConnell* v. *FEC*, 540 U.S. 93, 190 n.73, 203-209 (2003).

Appellant subsequently filed this action in federal district court, arguing that BCRA's restrictions on the corporate financing of "electioneering communications" are unconstitutional as applied to appellant's own broadcast advertisements. The three-judge district court unanimously denied appellant's request for preliminary injunctive relief, J.S. App. 4a-12a, and the court subsequently dismissed appellant's complaint, *id.* at 1a-3a.

1. The Federal Election Commission (Commission or FEC) is vested with statutory authority over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. 431-455 (2000 & Supp. II 2002), and other federal campaign-finance statutes. See J.S. App. 4a. The Commission is empowered to "formulate policy" with

respect to the FECA, 2 U.S.C. 437c(b)(1); "to make, amend, and repeal such rules * * * as are necessary to carry out the provisions of [the] Act," 2 U.S.C. 437d(a)(8), 438(d); 2 U.S.C. 438(a)(8) (Supp. II 2002); and to issue written advisory opinions concerning the application of the Act and Commission regulations to any specific proposed transaction or activity, 2 U.S.C. 437d(a)(7), 437f.

2. a. Federal law has long prohibited both for-profit and nonprofit corporations from using their general treasury funds to finance contributions and expenditures in connection with federal elections. See *FEC* v. *Beaumont*, 539 U.S. 146, 152-154 (2003). The FECA makes it "unlawful * * * for any corporation whatever * * * to make a contribution or expenditure in connection with any election" for federal office. 2 U.S.C. 441b(a). However, the FECA permits a corporation to establish a "separate segregated fund," commonly called a political action committee or PAC, to finance those disbursements. 2 U.S.C. 441b(b)(2)(C) (Supp. II 2002). The fund "may be completely controlled" by the corporation, and it is "separate" from the corporation "'only in the sense that there must be a strict segregation of its monies' from the corporation's other assets." *FEC* v. *National Right to Work Comm.*, 459 U.S. 197, 200 n.4 (1982) (quoting *Pipefitters* v. *United States*, 407 U.S. 385, 414 (1972)). The fund may solicit and accept donations voluntarily made for political purposes by the corporation's stockholders or members and its employees, and by the families of those individuals. 2 U.S.C. 441b(b)(4)(A)-(C). The money in a corporation's separate segregated fund can be contributed directly to candidates for federal office, and it may be used to pay for independent expenditures to communi-

cate to the general public the corporation's views on such candidates.

In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) (*MCFL*), this Court held that Section 441b's prohibition on the use of corporate treasury funds to finance independent expenditures for campaign-related speech could not constitutionally be applied to a corporation that (1) was "formed for the express purpose of promoting political ideas, and cannot engage in business activities"; (2) had "no shareholders or other persons affiliated so as to have a claim on its assets or earnings"; and (3) "was not established by a business corporation or a labor union, and [had a] policy not to accept contributions from such entities." *Id.* at 264; see *McConnell*, 540 U.S. at 210 ("Our decision in *MCFL* related to a carefully defined category of entities."); 11 C.F.R. 114.10 (implementing the *MCFL* exception). Corporations possessing the characteristics identified in that case are commonly referred to as "*MCFL* organizations." See, *e.g.*, *McConnell*, 540 U.S. at 210.

The Court in *MCFL* also adopted a narrowing construction of 2 U.S.C. 441b even as applied to corporate entities that do not qualify as *MCFL* organizations. In interpreting Section 441b's prohibition of corporate "expenditure[s]," the Court noted that the FECA definition of "expenditure" encompassed "the provision of anything of value made 'for the purpose of influencing any election for Federal office.'" *MCFL*, 479 U.S. at 245-246 (quoting 2 U.S.C. 431(9)(A)(i)) (emphasis omitted). To avoid problems of vagueness and overbreadth, the Court construed Section 441b's prohibition of independent expenditures from corporate treasuries to reach only the financing of communications that ex-

pressly advocate the election or defeat of a clearly identified candidate. *Id.* at 248-249; see 2 U.S.C. 431(17) (2000) (pre-BCRA version).

The Court had previously introduced the concept of express advocacy in *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976), when it narrowly construed other FECA provisions regulating independent campaign expenditures. *Buckley* provided examples of words of express advocacy, such as "vote for," "elect," "support," "defeat," and "reject." *Id.* at 44 n.52. "[T]hose examples eventually gave rise to what [became] known as the 'magic words' requirement," *McConnell*, 540 U.S. at 191, under which communications not using such terms were frequently held not to be covered by federal restrictions on corporate election-related expenditures. The Court in *Buckley* "adopted the 'express advocacy' requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons," *MCFL*, 479 U.S. at 249, thereby providing clear guidance to potential advertisers and avoiding undue inhibition of issue-related speech that is not intended to influence federal elections. See *McConnell*, 540 U.S. at 190-192; *Buckley*, 424 U.S. at 78-80.

b. Based on its assessment of evolving federal campaign practices, Congress subsequently determined that the "express advocacy" test had failed to provide an effective standard for distinguishing broadcast advertisements that are intended to influence federal elections from those that are not, at least during the periods immediately preceding federal elections. See

McConnell, 540 U.S. at 126-129, 193-194.[1] That was so for two basic reasons.

First, modern-day advertising professionals generally agree that the use of explicit words of electoral advocacy is rarely an effective means of persuasion. As the Court in *McConnell* explained, "campaign professionals testified [in that case] that the most effective campaign ads, like the most effective commercials for products such as Coca-Cola, should, and did, avoid the use of the magic words." 540 U.S. at 127; see *id.* at 127 n.18 (noting that only 4-5% of *candidate* advertisements in recent election cycles used magic words despite the absence of any regulatory incentive to avoid such language); *id.* at 193 & n.77. Indeed, as the Court in *McConnell* noted, one consultant in the field dismissed such appeals as "vote for" and "vote against" as "clumsy words," best to be avoided. *Ibid.* Advertisers who seek to influence federal elections therefore would rarely employ such explicit appeals even if the decision to do so carried no legal consequences, and a regulation focusing on such words would miss its target.

Second, the very existence of the "express advocacy" test—*i.e.*, the fact that communications contain-

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[1] Congress's concern about the inadequacy of the "express advocacy" test focused on broadcast electioneering advertisements aired during brief pre-election periods. See *McConnell*, 540 U.S. at 127 ("[T]he conclusion that [purported issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."). BCRA did not alter the application of the "express advocacy" standard to corporate and union disbursements for non-broadcast communications during those pre-election periods, or to any communication made outside the temporal and geographic limits incorporated into the definition of "electioneering communication." See 2 U.S.C. 431(17) (Supp. II 2002); 11 C.F.R. 100.22.

ing express advocacy of a federal candidate's election or defeat were subject to distinct legal restrictions, including Section 441b's prohibition on the use of corporate and union treasury funds to finance election-related "expenditures"—created an additional incentive for corporations and labor unions to craft advertisements that were broadcast shortly before federal elections and were designed to affect electoral outcomes, but that did not use explicit words of electoral advocacy. Corporations and labor unions therefore devised political communications that avoided such advocacy and financed those communications with "hundreds of millions of dollars" from their general treasuries. *McConnell*, 540 U.S. at 127. Those advertisements "were attractive to organizations and candidates precisely because they were beyond FECA's reach, enabling candidates and their parties to work closely with friendly interest groups to sponsor so-called issue ads when the candidates themselves were running out of money." *Id.* at 128. "[A]lthough the resulting advertisements [did] not urge the viewer to vote for or against a candidate in so many words, they [were] no less clearly intended to influence the election." *Id.* at 193. "[T]he conclusion that such ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election." *Id.* at 127.

After years of debate and extensive hearings, "Congress enacted BCRA to correct the flaws it found in the existing system." *McConnell*, 540 U.S. at 194. BCRA § 203 amended 2 U.S.C. 441b(b) to bar any corporation or union from paying for an "electioneering communication" with money from its general treasury. 2 U.S.C. 441b(b)(2) (Supp. II 2002). The term "electioneering

communication" is defined in pertinent part as a "broadcast, cable, or satellite communication" that (1) "refers to a clearly identified candidate for Federal office"; (2) is made within 60 days before a general election, or within 30 days before a primary election, for the office sought by the candidate; and (3) is "targeted to the relevant electorate." BCRA § 201(a), 116 Stat. 88, 2 U.S.C. 434(f)(3)(A)(i) (Supp. II 2002).[2]

BCRA also contains a "backup" definition of the term "electioneering communication" that takes effect if the primary definition "is held to be constitutionally insufficient by final judicial decision to support the regulation provided [in BCRA]." 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II 2002); see *McConnell*, 540 U.S. at 190 n.73. Under the backup definition, "the term 'electioneering communication' means any broadcast, cable, or satellite communication which promotes or supports a candidate for [a federal] office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II

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[2] BCRA excludes from that definition (i) a communication appearing in a news story, commentary, or editorial by a broadcasting station; (ii) a communication that is an expenditure or independent expenditure under the FECA; (iii) a candidate debate or forum; and (iv) any other communications the Commission exempts by regulation, consistent with certain requirements. BCRA § 201(a), 2 U.S.C. 434(f)(3)(B)(i)-(iv) (Supp. II 2002). The definition of "electioneering communication" also does not encompass print communications such as billboards, newspaper and magazine advertisements, brochures, and handbills, and it does not cover telephone or Internet communications. See *McConnell*, 540 U.S. at 207. Those modes of communication remain subject to the "express advocacy" test. See note 1, *supra*.

2002). Unlike the primary definition, the applicability of the backup definition is not limited to broadcast advertisements that are aired during the brief periods before federal elections or that are targeted to a particular audience.

BCRA's prohibition on the use of corporate and union treasury funds to finance "electioneering communications" applies to nonprofit as well as for-profit corporations. See *McConnell*, 540 U.S. at 209-210. That financing restriction is not subject to any express statutory exception for *MCFL* organizations. See *id.* at 211. "[T]o avoid constitutional concerns," however, the Court in *McConnell* construed the statutory ban on the use of corporate treasury funds for "electioneering communications" to be inapplicable to *MCFL* organizations. See *ibid.* Any corporation or union remains free, moreover, to establish a separate segregated fund and to pay for "electioneering communications" from that fund. 2 U.S.C. 441b(b)(2)(C) (Supp. II 2002).

3. In *McConnell*, this Court upheld against constitutional challenge BCRA § 203's ban on the use of corporate or union treasury funds for "electioneering communications." See 540 U.S. at 203-209. The Court observed that, "[b]ecause corporations can still fund electioneering communications with PAC money, it is 'simply wrong' to view * * * [BCRA § 203] as a 'complete ban' on expression rather than a regulation." *Id.* at 204 (quoting *Beaumont*, 539 U.S. at 162, and *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 658 (1990)). "The PAC option allows corporate political participation without the temptation to use corporate funds for political influence, quite possibly at odds with the sentiments of some shareholders or members." *Ibid.* (quoting *Beaumont*, 539 U.S. at 163). The Court also

noted that its campaign-finance jurisprudence manifests "respect for the legislative judgment that the special characteristics of the corporate structure require particularly careful regulation." *Id.* at 205 (citations and internal quotation marks omitted).

The Court in *McConnell* squarely rejected the plaintiffs' argument that Congress's authority to regulate the campaign-related speech of corporations and unions is limited, as a constitutional matter, to speech that contains "express advocacy" of particular electoral results. See 540 U.S. at 190-194. The Court explained that "the concept of express advocacy" was "not a first principle of constitutional law," but rather a matter of statutory construction "born of an effort to avoid constitutional infirmities" by placing a limiting construction on otherwise ambiguous statutory language. *Id.* at 192. The Court further observed that BCRA's "definition of 'electioneering communication' raises none of the vagueness concerns that drove [the Court's] analysis in *Buckley*" because the criteria used to define that term "are both easily understood and objectively determinable." *Id.* at 194.

The Court in *McConnell* also rejected the plaintiffs' contention that "the justifications that adequately support the regulation of express advocacy do not apply to significant quantities of speech encompassed by the definition of electioneering communications." 540 U.S. at 206. Based on its examination of the record before the district court, the Court concluded that the "vast majority" of prior advertisements encompassed by BCRA's definition of the term "electioneering communication" were intended to influence electoral outcomes. *Ibid.* The Court further observed that, "whatever the precise percentage may have been in the past, in the

future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund." *Ibid.* This Court also noted that, in light of its decision to "uphold all applications of the primary definition" of the term "electioneering communication," the Court "ha[d] no occasion to discuss the backup definition," *id.* at 190 n.73, which had been addressed and upheld in the district court decision under review, see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 184-185 (D.D.C. 2003) (per curiam).

4. Appellant Wisconsin Right To Life, Inc., is a nonprofit, nonstock Wisconsin corporation. Appellant's amended complaint asserted that the corporation is tax-exempt under Section 501(c)(4) of the Internal Revenue Code, and that it was organized to protect "individual human life from the time of fertilization until natural death." Amended Compl. ¶¶ 20, 22; see J.S. App. 4a. Appellant asserted that it does not qualify for any exception that would permit it to finance electioneering communications with corporate funds, alleging in particular that it is not a "qualified nonprofit corporation" under 11 C.F.R. 114.10—*i.e.*, the regulation that implements the *MCFL* exception. See J.S. App. 4a; p. 4, *supra*. Appellant administers its own separate segregated fund for campaign-related activity. See J.S. App. 5a. During the 1992 and 1998 election cycles, appellant's PAC made independent expenditures that, *inter alia*, opposed the candidacy of United States Senator Russell Feingold. See FEC Exhs. 8, 9.

Beginning in late 2003, candidates who opposed Senator Feingold's reelection efforts "made Senator Feingold's support of Senate filibusters against judicial

nominees a campaign issue." J.S. App. 5a. "In March 2004, [appellant's] PAC endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." *Ibid.* During early 2004, appellant "used a variety of non-broadcast communications" to express opposition to the filibustering of judicial nominees, and on July 14, 2004, it issued a news release criticizing Senator Feingold's record on that issue. *Ibid.* On July 26, 2004, appellant began using its corporate treasury funds to finance the airing of three broadcast advertisements that criticized the filibusters and identified Senator Feingold by name. *Id.* at 5a, 6a, 13a-17a.

5. On July 28, 2004, appellant filed suit against the FEC in federal district court, alleging that BCRA's prohibition on the use of corporate treasury funds for "electioneering communications" as defined in the Act is unconstitutional as applied to appellant's advertising disbursements. J.S. App. 6a. Appellant sought a preliminary injunction barring enforcement of the statute in these circumstances. *Ibid.* Appellant "anticipate[d] that its ongoing advertisements [would] be considered electioneering communications for purposes of federal statutory and regulatory definitions * * * during the period between August 15, 2004 and November 2, 2004." *Id.* at 5a. Pursuant to BCRA § 403(a)(1), 116 Stat. 114, a three-judge district court was convened to entertain the action.

The three-judge district court unanimously denied appellant's request for a preliminary injunction. J.S. App. 4a-12a. In addressing appellant's likelihood of success on the merits, the district court explained that "the reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds

before us." *Id.* at 7a. The district court observed that this Court in *McConnell* had expressly declined to address the "backup definition" of "electioneering communication" set forth in 2 U.S.C. 434(f)(3)(A)(ii) (Supp. II 2002) because the Court had upheld "*all applications of the primary definition.*" J.S. App. 7a (quoting *McConnell*, 540 U.S. at 190 n.73). The district court also noted that, in contrast to *McConnell*'s discussion of BCRA § 203, this Court had explicitly acknowledged that other challenged parts of BCRA might be subject to future as-applied challenges. *Id.* at 7a-8a.

The district court further explained that its "reading of *McConnell* that as-applied challenges to [2 U.S.C.] § 441b are foreclosed is but one reason [the court] f[ou]nd little likelihood of success on the merits." J.S. App. 8a. In addition, the court found that the specific facts of this case "suggest that [appellant's] advertisements may fit the very type of activity *McConnell* found Congress had a compelling interest in regulating." *Ibid.* The district court explained:

> In *McConnell*, the Court voiced the suspicion of corporate funding of broadcast advertisements just before an election blackout season because such broadcast advertisements "will *often* convey [a] message of support or opposition" regarding candidates. Here, [appellant] and [appellant's] PAC used other print and electronic media to publicize its filibuster message—a campaign issue—during the months prior to the electioneering blackout period, and only as the blackout period approached did [appellant] switch to broadcast media. This followed the PAC endorsing opponents seeking to unseat a candidate whom [appellant] names in its broadcast advertisements, and

the PAC announcing as a priority "sending Feingold packing."

Id. at 8a-9a (citations omitted).

The district court subsequently dismissed appellant's complaint in an unpublished memorandum opinion and order. J.S. App. 1a-3a. The court held, "for the reasons set forth in [the preliminary-injunction] opinion," that appellant's as-applied challenge was "foreclosed by [this] Court's decision in *McConnell*." *Id.* at 2a-3a.

SUMMARY OF ARGUMENT

A. Just two Terms ago in an extraordinary sitting, this Court considered and rejected a facial challenge to BCRA's restrictions on the corporate financing of "electioneering communications" as defined in the Act. *McConnell* v. *FEC*, 540 U.S. 93 (2003). The Court's decision in *McConnell* effectively forecloses appellant's as-applied constitutional challenge to those restrictions. The Court recognized that the term "electioneering communication," as defined in BCRA § 201(a), would encompass some advertisements that were not intended to influence federal elections. Indeed, much of the dispute among the parties concerning the restrictions centered on the degree of prophylaxis in BCRA's primary definition and on whether any prophylaxis was permissible under the First Amendment.

The Court in *McConnell* nevertheless sustained BCRA's bright-line approach and held that the challenged BCRA provisions were valid in *all* their applications, explaining that constitutionally sufficient alternatives remain available to advertisers who do not intend to affect voting behavior. The Court's analysis therefore precludes the type of as-applied challenges that otherwise might be brought following an unsuccessful facial

challenge to a statute. Principles of *stare decisis* strongly counsel in favor of strict adherence to the Court's decision in *McConnell*.

B. Acceptance of appellant's *own* as-applied constitutional challenge not only would be inconsistent with the Court's decision in *McConnell*, but would be especially disruptive of the statutory scheme upheld in that case. The statutory definition of "electioneering communication" is intended to provide a clear bright-line rule that correlates closely, though admittedly not precisely, with intent to influence federal elections. The bright-line nature of the rule—both its practical advantages and its alleged constitutional deficiencies—was a focal point of the constitutional challenge in *McConnell*.

In its as-applied challenge, by contrast, appellant has made no effort to articulate an objective and determinate standard for identifying those advertisers or advertisements as to which the BCRA financing restrictions are unconstitutional. Indeed, in its jurisdictional statement appellant proposed a 16-factor test. In contrast to the objective and clearly-defined constitutional exemption adopted by this Court in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986), appellant's ad hoc approach would require the sort of formless and unpredictable inquiry into a corporate advertiser's subjective purpose that Congress and this Court have sought to avoid. In addition, it would invite fact-intensive litigation and would require federal courts to parse the content of political advertisements and assess the likely intent of political advertisers in preliminary-injunction or temporary-restraining-order hearings conducted on the eve of federal elections.

C. There is no merit to appellant's claim that "grass-roots lobbying"—by which appellant appears to mean

efforts to persuade members of the public to contact elected officials regarding particular policy issues—is constitutionally exempt from BCRA's restrictions on corporate financing of "electioneering communications." A particular advertisement may be intended to induce citizens both to contact their elected representatives and to vote in a particular manner. Indeed, as Congress found, a group that feels strongly enough about an issue to air an advertisement on it in the months before an election—particularly a group, such as appellant, that has publicly opposed a candidate mentioned in its advertisements, see pp. 11-12, *supra*—will invariably have a view as to which candidates may be more favorably disposed to the group's view of the issue. Congress's authority to superintend federal elections includes the power to regulate corporate financing of such dual-purpose communications. Even if the Court were to conclude that Congress lacks a substantial *independent* interest in regulating corporate issue advocacy or "grassroots lobbying" as such, the incidental impact on such communications of measures reasonably designed to safeguard the electoral process neither renders the challenged BCRA provisions unconstitutional nor opens them to attack on an ad hoc, as-applied basis.

D. In light of Congress's requirement that corporate "electioneering communications" be financed through a PAC, appellant has no constitutional right to pay for the advertisements at issue here from a "segregated bank account" instead. Although appellant has expressed some willingness to finance its "grassroots lobbying" with funds donated solely by individuals, a corporate PAC is subject to significant fundraising restrictions and disclosure obligations that would not apply under appellant's "segregated bank account" proposal. Con-

gress considered and rejected the financing alternative that appellant suggests, and the Court in *McConnell* sustained the application of the relevant BCRA provisions to nonprofit corporations, like appellant, that do not fall within the *MCFL* exemption. And because appellant's "segregated bank account" proposal turns both on the content of the relevant communications and on the perceived relative importance of various BCRA provisions, it is likely incapable of workable administration.

ARGUMENT

THE DISTRICT COURT CORRECTLY REJECTED APPELLANT'S AS-APPLIED CONSTITUTIONAL CHALLENGE TO BCRA'S RESTRICTIONS ON THE CORPORATE FINANCING OF "ELECTIONEERING COMMUNICATIONS"

Just two Terms ago, this Court rejected a facial constitutional challenge to BCRA § 203's ban on the use of corporate treasury funds to finance "electioneering communications." *McConnell* v. *FEC*, 540 U.S. 93, 203-209 (2003). In doing so, the Court specifically held that BCRA § 201(a)'s primary definition of that term—which, the Court recognized, contained a degree of prophylaxis—is constitutional in "all applications." *Id.* at 190 n.73. Appellant now contends (Br. i) that BCRA § 203 is unconstitutional as applied to the advertisements aired by appellant in July 2004, and to "grassroots lobbying communications generally." As the district court correctly held, appellant's as-applied challenge is squarely foreclosed by *McConnell*, and principles of *stare decisis* counsel strongly against deviating from *McConnell* here. In any event, appellant offers no sound basis for doubting that its own communications were intended at least in part to influence electoral outcomes, nor does it articulate a workable standard for

identifying those "electioneering communications" as to which a constitutional exemption should apply. The judgment of the district court therefore should be affirmed.

A. Appellant's As-Applied Constitutional Challenge Is Foreclosed By This Court's Decision In *McConnell*

The Court need go no further than *McConnell* to dispose of this case. As the district court explained in denying appellant's request for preliminary injunctive relief, although *McConnell* involved a facial challenge, the "reasoning of the *McConnell* Court leaves no room for the kind of 'as applied' challenge [appellant] propounds" here. J.S. App. 7a. The record in *McConnell* contained numerous advertisements that fell within BCRA's definition of "electioneering communication," but that the plaintiffs characterized as "pure issue advertisements." *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 574 (D.D.C. 2003) (Kollar-Kotelly, J.); see *id.* at 574-579. This Court in *McConnell* was thus directly confronted with the contention that BCRA § 203 is unconstitutional because of its potential to burden communicative activity that qualifies as an "electioneering communication" under BCRA but is not intended to influence federal elections. Indeed, the fact that the statute could apply to such advertisements was the *focus* of the plaintiffs' constitutional challenge to BCRA § 203 in *McConnell*.

While acknowledging that BCRA § 201(a)'s primary definition of "electioneering communication" might encompass some such advertisements, the Court squarely held that the definition is constitutional in *all* its applications. In reaching that conclusion—which was necessary to the Court's rejection of the plaintiffs' challenge to BCRA § 203 and to its decision not to address the consti-

tutionality of the backup definition—the Court recognized that BCRA §§ 201(a) and 203 impose only a modest burden on speakers who wish to discuss issues of public concern but do not intend to influence federal elections, and that the establishment of an objective bright-line rule was essential to the achievement of Congress's objectives. As a result, although the rejection of a facial challenge to the constitutionality of a statute typically will have no impact on a plaintiff's ability to bring a subsequent as-applied challenge, in this case the prophylactic nature of the provision at issue, the pointed constitutional challenge to such prophylaxis, and the reasoning of the Court in *McConnell* in rejecting that challenge necessarily preclude subsequent as-applied attacks.

1. The parties in *McConnell* recognized that BCRA's primary definition of "electioneering communication" encompasses at least some advertisements that are not intended to influence federal elections, while disagreeing about the constitutional significance of that fact. The plaintiffs contended that such advertisements comprise a sufficiently large percentage of the total communications covered by BCRA § 203 as to render the provision unconstitutional on its face. See, *e.g.*, Br. for Senator Mitch McConnell, et al. at 49-57, *McConnell* v. *FEC*, *supra* (Nos. 02-1674, et al.). The statute's defenders, by contrast, argued that the plaintiffs' overbreadth challenge should be rejected because "BCRA's primary definition of 'electioneering communications' is narrowly tailored to advance several different compelling government interests," Br. for FEC, et al. at 105, *McConnell* v. *FEC*, *supra* (Nos. 02-1674, et al.), and because the "electioneering communication" provisions

impose only minimal burdens on the corporate and union advertisers to which those provisions apply, *id.* at 106.

This Court's categorical rejection of the plaintiffs' overbreadth challenge, unaccompanied by any suggestion that the acknowledged prophylactic scope of BCRA's "electioneering communication" provisions could furnish the basis for a subsequent as-applied constitutional attack, effectively forecloses appellant's current claim that its advertisements are immune from federal regulation because they purportedly fall outside the heartland of Congress's concern. That is particularly true given that Congress quite intentionally adopted a bright-line, prophylactic rule for identifying "electioneering communications" by establishing statutory criteria that indisputably cover the advertisements at issue in this case. This Court approved that bright-line approach over the objection of dissenting Justices that such prophylactic rules were incompatible with the First Amendment. See *McConnell*, 540 U.S. at 281-282 (Thomas, J., dissenting); *id.* at 334 (Kennedy, J., dissenting).[3]

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[3] The government's brief in *McConnell* argued that, "[t]o the extent that the definition [of 'electioneering communication'] is not *perfectly* tailored, the marginal applications that form the basis of plaintiffs' challenge arguably could be addressed on an as-applied basis." Br. for FEC, et al. at 105-106, *McConnell* v. *FEC*, *supra* (Nos. 02-1674, et al.). The principal thrust of the government's defense of the "electioneering communication" provisions, however, was that BCRA's primary definition of that term is valid because of the importance of the government interests served by those provisions and the minimal nature of the burdens they impose. See generally *id.* at 103-112. The Court in *McConnell* agreed with the latter contention and did not identify future as-applied challenges as a possible means of addressing the acknowledged (and unavoidable) imprecision in the statutory definition. Accordingly, the statement in the government's brief

Indeed, far from suggesting that BCRA § 203's restrictions on the funding of "electioneering communications" would be subject to future as-applied First Amendment challenges, the Court in *McConnell* made clear that those restrictions are constitutional in "*all* applications." 540 U.S. at 190 n.73 (emphasis added). After noting that BCRA contains both a primary and a "backup" definition of the term "electioneering communication" (see p. 7-9, *supra*), the Court stated that, because it had upheld "all applications of the primary definition" against the plaintiffs' constitutional challenge, the Court had "no occasion to discuss the backup definition." 540 U.S. at 190 n.73. The Court's declination was particularly significant because the district court decision under review had rejected the primary definition and had addressed and upheld the backup definition. See *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 184-185 (D.D.C. 2003) (per curiam). In this Court, moreover, the principal dissent on Title II of BCRA disagreed with the Court's decision to uphold the primary definition and therefore addressed the constitutionality of the backup definition. See *McConnell*, 540 U.S. at 337-338 (Kennedy, J., dissenting).[4]

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provides no basis for limiting the scope of the Court's holding in *McConnell*.

[4] The fact that Congress included a more fact-dependent backup definition of "electioneering communication" indicates Congress's awareness that the prophylactic nature of its *primary* definition could subject BCRA §§ 201(a) and 203 to a constitutional overbreadth challenge. Inclusion of the backup definition further suggests a congressional expectation that the primary definition would be either sustained or invalidated *in toto*. In light of the *McConnell* Court's rejection of the plaintiffs' overbreadth challenge to the primary definition, and to BCRA's attendant restrictions on corporate financing of "electioneering communications," it would subvert both Congress's

Later in its opinion, the Court summarized its holding with respect to BCRA § 203. The Court specifically described its analysis of that provision as "upholding stringent restrictions on *all* election-time advertising that refers to a candidate because such advertising will *often* convey [a] message of support or opposition." *McConnell*, 540 U.S. at 239. Accordingly, the Court's decision in *McConnell* effectively forecloses the type of follow-on, as-applied constitutional attack on the statute attempted by appellant here.[5]

2. To be sure, in a typical case, a determination that a statute is facially valid will simply mean that the statute is capable of constitutional application and will not compel the conclusion that the law is constitutional in *all* its applications. Cf. *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). A judicial decision rejecting a facial challenge to a statute therefore will not ordinarily foreclose subsequent as-applied attacks. In this case, however, appellant's as-applied constitutional challenge to BCRA § 203 is inconsistent both with the prophylactic nature of the BCRA provisions at issue and with this Court's rationale for rejecting the *McConnell* plaintiffs' facial challenge.[6]

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intent and this Court's decision to permit appellant's current as-applied challenge to go forward.

[5] Appellant suggests (Br. 15) that the Court in *McConnell* held BCRA's restrictions on corporate financing of electioneering communications to be unconstitutional as applied to *MCFL* organizations. That is incorrect. Rather, "to avoid constitutional concerns," the Court *interpreted* those restrictions to be inapplicable to *MCFL* organizations, and it sustained the validity of BCRA § 204 (116 Stat. 92) as so construed. See 540 U.S. at 211.

[6] In other contexts as well, the doctrinal test the Court employs in resolving a facial challenge may have the effect of foreclosing sub-

In arguing that this Court's opinion in *McConnell* should not be construed to foreclose as-applied challenges to BCRA § 203's restrictions on the financing of "electioneering communications," appellant observes (Br. 15) that "no court can foresee all possible future fact situations that might arise and require the considered constitutional analysis of the federal courts." This Court in *McConnell* recognized, however, that BCRA's definition of "electioneering communication" could encompass some advertisements that were not actually intended to influence electoral outcomes. As noted above, that fact was the subject of briefing by the parties and formed the basis for the plaintiffs' overbreadth challenge. See pp. 10-11, *supra*; see, *e.g.*, Br. for National Right to Life Committee, Inc., at 15-35 (No. 02-1733). In holding that the prospect of such applications did not render the statute unconstitutionally overbroad, the Court explained:

> The precise percentage of issue ads that clearly identified a candidate and were aired during those relatively brief [*i.e.*, 30- and 60-day] preelection timespans but had no electioneering purpose is a matter of dispute between the parties and among the judges on the District Court. Nevertheless, the vast

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sequent as-applied attacks. For example, this Court's determination that a federal statute enacted pursuant to Section 5 of the Fourteenth Amendment is "congruent and proportional" to the constitutional violations sought to be remedied, see, *e.g.*, *Nevada Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727-728, 737-740 (2003), should be understood to foreclose a subsequent contention that the law is unconstitutional as applied to a particular defendant whose conduct falls within the statute's prophylactic scope—at least if the as-applied challenge is premised on the fact that the conduct falls within the prophylaxis.

> majority of ads clearly had such a purpose. *Moreover, whatever the precise percentage may have been in the past, in the future corporations and unions may finance genuine issue ads during those timeframes by simply avoiding any specific reference to federal candidates, or in doubtful cases by paying for the ad from a segregated fund.*

540 U.S. at 206 (emphasis added; citations omitted).

The Court in *McConnell* thus recognized that at least some advertisements falling within BCRA § 201(a)'s definition of "electioneering communication" are not actually intended to influence federal elections. Far from suggesting that BCRA's financing restrictions would be subject to constitutional challenge as applied to such advertisements, however, the Court stated that corporations and unions could comply with the law by (1) "simply avoiding any specific reference to federal candidates" or (2) "paying for the ad from a segregated fund." 540 U.S. at 206. The Court's description of the legal alternatives open to future corporate advertisers whose communications might fall within BCRA § 201(a)'s carefully crafted definition of "electioneering communication" is wholly inconsistent with appellant's contention that, so long as an advertiser does not intend to influence federal elections, it is constitutionally entitled to use general treasury funds to finance advertisements encompassed by BCRA's definition of "electioneering communication." It is also wholly improbable that the Court in *McConnell* would have gone to such lengths to explain the alternatives available to corporations and unions and why BCRA § 201(a) is constitutional in "all applications" if it intended to leave the door open to as-applied constitutional challenges by any corporate or union advertiser willing to argue that it did not

intend an advertisement falling within the definition of "electioneering communication" to influence a federal election.[7]

In this regard, the *McConnell* Court's rejection of the constitutional attack on the prophylactic nature of BCRA's treatment of "electioneering communications," and the effect of that rejection on subsequent as-applied challenges, are no different from previous campaign-finance precedents. In upholding contribution limits, the Court has recognized that many who would contribute above the limit do so without any intent to distort the system, but the Court has nonetheless upheld such limits without opening the door to subsequent as-applied attacks by large-dollar donors with pure motives. See p. 30, *infra*. Likewise, in *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652 (1990), when the Court rejected the contention that a corporate expenditure ban was overbroad because the ban encompassed closed corporations without great wealth, see *id.* at 661, the Court effectively foreclosed any subsequent claim that the statute was unconstitutional as applied to a closed corporation.

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[7] In contrast to its discussion of the definition of "electioneering communication," the Court explicitly referred to the availability of as-applied challenges in at least three distinct contexts in upholding portions of Title I of BCRA against facial attack, in at least one context in upholding part of BCRA Title V, and once regarding the disclosure requirements of Title II. See 540 U.S. at 157 n.52, 159, 173, 199, 244. Similarly in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court provided specific guidance as to what evidence would be required in later as-applied challenges by minor parties claiming exemption from the FECA's disclosure requirements, see *id.* at 70-71—guidance that the Court later followed in *Brown* v. *Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 92-102 (1982).

B. Acceptance Of Appellant's As-Applied Challenge To BCRA's "Electioneering Communications" Provisions Would Substantially Undermine Congress's Effort To Develop An Objective Bright-Line Rule For Identifying The Election-Related Advertisements That May Not Be Financed With Corporate And Union Treasury Funds

As explained above, this Court's analysis in *McConnell* forecloses as-applied constitutional challenges to BCRA's "electioneering communications" provisions, at least where, as here, the gravamen of the claim is that specific advertisements indisputably encompassed by the statutory definition and with some effect on a federal election nonetheless are not actually intended to influence federal elections. Accepting a single as-applied challenge of that type would significantly erode if not defeat the primary definition adopted by Congress by permitting any political advertiser to argue that an advertisement that meets the statutory criteria for an "electioneering communication" nonetheless cannot be regulated as such because it was not actually intended to influence a federal election.

Acceptance of appellant's *own* constitutional challenge, moreover, would be *especially* disruptive of the statutory scheme upheld in *McConnell*. Appellant has made no effort to identify, through objective and determinate criteria, a clearly-defined class of advertisers (cf. *FEC* v. *Massachusetts Citizens for Life*, 479 U.S. 238 (1986); pp. 31-33, *infra*) or advertisements as to which the BCRA restrictions are alleged to be unconstitutional. Rather, appellant appears to contemplate that the resolution of each as-applied challenge will turn on an amorphous, case-specific inquiry into the actual intent of a particular speaker. That approach would sub-

vert Congress's effort to devise clear and workable standards for distinguishing political speech for which corporate and union treasury funds may be used from electioneering advertisements that must be financed through a PAC, and it would invite fact-intensive litigation that would enmesh courts in political debates on the eve of federal elections.

1. This Court in *Buckley* introduced the "express advocacy" test in order to ensure that earlier FECA provisions—including a provision that limited disbursements "for the purpose of . . . influencing" a federal election—were not intolerably vague. See *Buckley* v. *Valeo*, 424 U.S. 1, 43-44, 77-80 (1976); *McConnell*, 540 U.S. at 190-192. Based on subsequent experience under the campaign-finance laws, however, Congress concluded, and the evidentiary record in *McConnell* amply demonstrated, that the "express advocacy" test did not adequately identify electioneering activity during the crucial pre-election periods. See *id.* at 127 & n.18, 193 n.77; pp. 6-7, *supra*.

After extensive investigation and debate, see, *e.g.*, *McConnell*, 540 U.S. at 129-132, "Congress enacted BCRA to correct the flaws it found in the existing system," *id.* at 194. The criteria specified in BCRA § 201(a)'s definition of "electioneering communication" correlate closely, though not precisely, with intent to influence federal elections. See *id.* at 206 (Court finds that the "vast majority" of prior advertisements encompassed by the definition "clearly" had an "electioneering purpose"). Congress took particular care, moreover, to provide clear warning to regulated parties by crafting a legal standard that

> raises none of the vagueness concerns that drove [the Court's] analysis in *Buckley*. The term "elec-

> tioneering communication" applies only (1) to a broadcast (2) clearly identifying a candidate for federal office, (3) aired within a specific time period, and (4) targeted to an identified audience of at least 50,000 viewers or listeners. These components are both easily understood and objectively determinable.

Id. at 194.

Congress thus sought to prevent the wholesale evasion of restrictions on corporate and union campaign spending during the pre-election period that had existed under the pre-BCRA legal regime, while providing clear notice to corporate and union speakers of the legal restrictions that govern their communications. The definition of "electioneering communication," moreover, determines not what corporations may say, but whether particular advertisements may be financed with general treasury funds or must instead be financed through a PAC. And, on that issue, clear notice is particularly important.

2. Appellant's approach would reintroduce the indeterminacy that Congress and this Court have specifically sought to dispel in this important context. See, *e.g.*, *Buckley*, 424 U.S. at 43 (intent-based standard for identifying electioneering activity "offers no security for free discussion," "blankets with uncertainty whatever may be said," and "compels the speaker to hedge and trim") (quoting *Thomas* v. *Collins*, 323 U.S. 516, 535 (1945)). In its jurisdictional statement, appellant identified no less than 16 separate factors that purportedly "indicate[d] that [its] broadcast ads are authentic grass-roots lobbying and not electioneering." J.S. 5; see J.S. 5-6. Appellant's brief on the merits neither disavows those factors nor articulates any determinate legal test for resolving appellant's as-applied constitutional challenge.

Instead, appellant points to (Br. 4 n.4 (italics omitted)) four "details" of the pertinent advertisements (pertaining to the "topic," "timing," "candidate reference," and "tone" of the advertisements) that purportedly reveal appellant's intent to engage in "authentic grassroots lobbying and not electioneering."[8]

Appellant does not make clear whether it views all of the factors it identifies as necessary to establish entitlement to a constitutional exemption, whether a smaller subset of those factors would suffice, or when resort to the additional factors identified in its jurisdictional statement would be appropriate. Nor does appellant identify any principled reason that another litigant would be precluded from relying on *additional* factors suggesting that a particular advertisement was not intended to influence federal elections or would not have that effect. If appellant's approach were adopted, the permissibility of corporate and union disbursements would turn on the same sort of unstructured inquiry that the Court in *Buckley* found constitutionally problematic, and that Congress in enacting BCRA carefully sought to avoid.[9]

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[8] In other contexts, this Court has recognized the drawbacks of the type of indeterminate inquiry proposed by appellant here, including the potential for such a multi-factor, fact-dependent test to precipitate excessive litigation. See, *e.g.*, *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 547 (1995) ("[T]he proposed four- or seven-factor test would be hard to apply, jettisoning relative predictability for the open-ended rough-and-tumble of factors, inviting complex argument in a trial court and a virtually inevitable appeal.").

[9] Some of appellant's amici offer their own definitions of "grassroots lobbying" and suggest that the approach outlined in appellant's jurisdictional statement would provide insufficient protection for corporate and union political advertising. See Br. of Chamber of Commerce 19, 20 n.12 (arguing that "most of [appellant's proposed] factors

In addressing constitutional challenges to other FECA provisions, this Court has recognized the value of bright-line rules in preventing evasion of the statute's anti-corruption purposes and in furnishing clear guidance to regulated entities. In *Buckley*, for example, the Court "assumed" that "most large contributors do not seek improper influence over a candidate's position or an officeholder's action." 424 U.S. at 29. The Court held, however, that the difficulty of isolating suspect contributions and Congress's interest in guarding against the inherent appearance of abuse justified uniform application of the $1000 individual contribution limit. *Id.* at 29-30. The Court's analysis clearly foreclosed future as-applied challenges to the contribution limits brought by well-intentioned donors who might seek to prove that their own contributions, though in excess of the statutory caps, would be made without any intent to receive special influence in return.[10] Where, as

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simply are not necessary" and suggesting instead an exemption for advertisements that address an "active legislative issue" and refer to candidates "only in their capacity" as incumbents with "responsibility" for the issue); Br. of McConnell 9 ("[g]rass-roots lobbying * * * encompasses any communication devoted exclusively to urging support or opposition for pending legislative or executive matters"); Br. of AFL-CIO 19, 22 (asserting that the "presence or absence of most" of the "16 features" in appellant's jurisdictional statement "should not be prerequisites to status as a 'genuine issue ad,'" and proposing a standard under which a broadcast must, *inter alia*, have a "substantial legislative or other non-electoral purpose"); Br. of Alliance for Justice 27 (arguing that appellant's "test" is "too narrow" and insisting that "referencing a targeted candidate's *position* on the issue in question is often necessary to the effectiveness of lobbying communications").

[10] Cf. *Goland* v. *United States*, 903 F.2d 1247, 1258-1259 (9th Cir. 1990) (contributions are subject to FECA limits even if a contributor keeps his identity a secret by using straw donors, thereby allegedly precluding the opportunity to exert undue influence).

here, recognition of a particular class of as-applied challenges to a bright-line rule would undermine Congress's substantial interest in clarity and predictability, there is nothing anomalous or unprecedented about foreclosing such challenges.[11]

3. The Court's decision in *MCFL*, *supra*, which exempted certain organizations from the FECA ban on corporate electioneering (see p. 4, *supra*), furnishes an

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[11] In upholding other restrictions on communicative activity against First Amendment challenges, the Court has similarly stressed the value of clear bright-line rules. In *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618 (1995), for example, the Court upheld Florida Bar rules prohibiting lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster. *Id.* at 620. The Court did not question the claims of those challenging the rules that the injuries or grief of some victims are "relatively minor," but stressed instead that making case-specific judgments would entail "drawing difficult lines" as to the severity of different kinds of "grief, anger, or emotion." *Id.* at 633. The Court concluded that the Florida Bar's bright-line, 30-day rule was "reasonably well tailored to its stated objective of eliminating targeted mailings" that had caused many Floridians "to lose respect for the legal profession." *Ibid.* In *Hill* v. *Colorado*, 530 U.S. 703 (2000), the Court upheld a state law (see *id.* at 707) that prohibited demonstrators from coming closer than eight feet to unconsenting persons entering health-care facilities. The Court acknowledged that the law would "sometimes inhibit a demonstrator whose approach in fact would have proved harmless." *Id.* at 729. In light of the "great difficulty" of determining on an individualized basis whether particular approaches were "harassing," however, the Court concluded that "[a] bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself." *Ibid.*; see *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) ("any such exemption [from a rule limiting certain solicitation activities to specified physical locations] cannot be meaningfully limited to [the plaintiff], and as applied to similarly situated groups would prevent the State from furthering its important concern").

instructive contrast. The Court in *MCFL* explained that the rationale for prohibiting corporate independent expenditures in support of federal candidates "does not extend uniformly to all corporations," and that "[s]ome corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status." *Id.* at 263. The Court concluded that

> MCFL has three features essential to [the Court's] holding that it may not constitutionally be bound by § 441b's restriction on independent spending. *First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. * * * *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. * * * *Third*, MCFL was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

Id. at 263-264.

The Court in *MCFL* thus identified a discrete and clearly-defined *class* of corporations as to which the justifications for FECA's restrictions on corporate electioneering were found not to apply. See *McConnell*, 540 U.S. at 210 (This Court's "decision in *MCFL* related to a carefully defined category of entities."). The exemption recognized in *MCFL* turns on an objective and readily administrable assessment of the organization's structure and overall activities, and can be understood as a means of identifying a subset of corporations for which a separate segregated fund for campaign-related expenditures would entail unnecessary burdens. Nei-

ther *MCFL* nor any subsequent decision of this Court, however, suggests that a corporation lacking the "three features essential to" the holding in that case (479 U.S. at 263) is entitled to bring an as-applied challenge seeking an individualized judicial determination whether, in light of the corporation's unique combination of attributes, its use of general treasury funds to finance campaign-related speech would actually create the dangers that the FECA/BCRA restrictions are intended to prevent.[12]

In two distinct respects, appellant's proposed mode of as-applied constitutional analysis would thus create difficulties of administration far greater than those entailed by the existing constitutional exemption for *MCFL* organizations. First, because appellant's as-applied challenge rests on the content of specific advertisements, rather than on the organization's structure and activities taken as a whole, acceptance of appellant's

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[12] Before this Court's decision in *McConnell*, some courts of appeals had concluded that even a nonprofit corporation that did not satisfy the *MCFL* criteria could seek a constitutional exemption from the FECA financing restrictions by arguing that, because it purportedly received only minimal donations from business corporations, its election-related disbursements of general treasury funds would not entail the dangers generally associated with corporate electoral advocacy. See *FEC* v. *NRA*, 254 F.3d 173, 191-193 (D.C. Cir. 2001); *North Carolina Right to Life, Inc.* v. *Bartlett*, 168 F.3d 705, 714 (4th Cir. 1999), cert. denied, 528 U.S. 1153 (2000); *FEC* v. *Survival Educ. Fund, Inc.*, 65 F.3d 285, 292 (2d Cir. 1995); *Day* v. *Holahan*, 34 F.3d 1356, 1365 (8th Cir. 1994), cert. denied, 513 U.S. 1127 (1995). That understanding of *MCFL*, however, appears to have been effectively repudiated in *McConnell*. The Court in *McConnell* confirmed that its "decision in *MCFL* related to a carefully defined category of entities," 540 U.S. at 210, and it held without qualification that nonprofit corporations other than *MCFL* organizations could constitutionally be barred from using general treasury funds to finance "electioneering communications," see *id.* at 209-211.

approach would focus on the particular speech at issue, rather than on the entity in general, and thus every advertisement would provide a new opportunity for litigation. Indeed, even the *same* advertisements might provide the basis for new litigation in the case of a different speaker who alleged that *he* did not intend for the advertisements to influence an election.

Second, because appellant has made no effort to articulate an objective and determinate standard for identifying those corporate broadcast advertisements to which the BCRA financing restrictions cannot constitutionally be applied, the resolution of each such challenge would involve a complex and fact-bound inquiry rather than the application of a clear categorical rule. Acceptance of appellant's proposed constitutional methodology would thus multiply litigation over federal campaign-finance regulation, substantially complicate the administration of federal restrictions on corporate and union electioneering by blurring the bright lines drawn by Congress, and markedly subvert Congress's effort to avoid "the vagueness concerns that drove [this Court's] analysis in *Buckley*." *McConnell*, 540 U.S. at 194.

Moreover, all of this factbound litigation would occur in the context of preliminary-injunction or temporary-restraining-order hearings on the eve of elections and would enmesh the federal courts in political debate, since BCRA § 201(a)'s definition of "electioneering communication" is limited to advertisements that, *inter alia*, are aired in the 30- or 60-day window before a federal election and identify a federal candidate by name. The fact that as-applied challenges would likely arise shortly before federal elections would also require the courts to attempt to process the suits on an expedited basis, multiplying the complexity and costs of the litigation for all

involved. And under BCRA § 403(a) and (d), 116 Stat. 113-114, the plaintiff in any such suit would be entitled to have the action heard by a three-judge district court, with a right of appeal directly to this Court.

At a minimum, even if *some* type of as-applied constitutional challenge to BCRA's primary definition can be successfully brought in the wake of *McConnell*, the Court should require the plaintiff in such a suit to point to an objective, readily discernible basis for identifying an allegedly unconstitutional application. Appellant has demonstrably failed to identify such a basis for invalidating BCRA § 203 as applied to the advertisements at issue here.

C. Even If Appellant Could Demonstrate That The Advertisements At Issue Here Were "Grassroots Lobbying" Advertisements, Appellant Would Not Be Entitled To A Constitutional Exemption From BCRA's Ban On The Use Of Corporate Treasury Funds To Finance "Electioneering Communications"

The thrust of appellant's argument in this case is that Congress lacks constitutional authority to forbid the use of corporate treasury funds to broadcast "grassroots lobbying" advertisements. Although appellant does not unequivocally endorse any particular definition of the term "grassroots lobbying," appellant appears (see, *e.g.*, Br. 21) to use the term to refer to efforts to influence government policy indirectly by urging *other* members of the public to contact their elected represen-

tatives regarding particular policy issues.[13] Appellant's constitutional claim is misconceived.

1. Appellant's contention (Br. 4 n.4) that the advertisements at issue here "were authentic grassroots lobbying and not electioneering" assumes a clean divide between lobbying and electioneering communications that simply does not exist in the real world. In the first place, it is not clear that appellant's effort to distinguish "grassroots lobbying" from electioneering is materially different from the distinction between issue advocacy and political advocacy rejected by Congress in BCRA and by this Court (both the majority and the dissenters) in *McConnell*. See, *e.g.*, *McConnell*, 540 U.S. at 126 n.16 ("What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day.") (quoting district court opinions, in turn quoting National Rifle Association official); *id.* at 327 (Kennedy, J., dissenting).

In the district court proceedings in *McConnell*, Judge Leon cast the deciding vote with respect to BCRA § 201(a), voting to strike down the primary definition of "electioneering communication," see *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 792-799 (D.D.C. 2003), but to uphold the backup definition, see *id.* at 799-803; see also *id.* at 187 (summary of the district court's holdings in *McConnell* with respect to the various challenged BCRA provisions). Judge Leon concluded that the primary

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[13] Although petitioner invokes "the inherent right of the people to participate in self-government and the express First Amendment right to petition" (Br. 17), BCRA does not restrict the efforts of corporations or others to contact elected officials directly. The term "electioneering communication" is limited to broadcast, cable, or satellite communications that, *inter alia*, "can be received by 50,000 or more persons" within the State or district that the candidate identified in the communication seeks to represent. 2 U.S.C. 434(f)(3)(C) (Supp. II 2002).

definition was invalid because of its potential impact on "genuine issue advertisements in the periods immediately preceding general and primary elections, the sole purpose of which is educating the viewers about an upcoming vote on pending legislation, and encouraging them to inform their elected representative to vote for or against the bill." *Id.* at 793. In this Court, various plaintiffs similarly contended that BCRA's "electioneering communications" provisions are unconstitutional because the primary definition of that term would encompass advertisements urging citizens to contact their elected representatives regarding pending legislative issues. See, *e.g.*, Br. of AFL-CIO at 19 (No. 02-1755) (definition encompasses communications that "[c]all upon a Member of Congress to support or oppose imminent legislation, or ask viewers or listeners to urge the Member to do so"); Br. of Senator Mitchell et al. at 50-52 (No. 02-1674 et al.). Appellant's current contention that the challenged BCRA financing restrictions are unconstitutional as applied to "grassroots lobbying" therefore adds nothing of substance to what was before the Court in *McConnell*.

In any event, appellant's proposed lobbying/electioneering distinction dissolves in practical application. As abundant evidence before Congress and the *McConnell* Court made clear, advertisements exhorting interested citizens to contact their elected representatives may *also* have the purpose of influencing those citizens' votes. As Congress recognized, common sense suggests that an individual or organization that funds advertisements exhorting citizens to contact their elected representatives on an issue will generally prefer that voters cast their ballots for candidates who favor the advertiser's view. And in any event, a broadcast

advertisement that is aired shortly before a federal election, refers to a clearly identified federal candidate, and is targeted to the relevant electorate is likely to have a significant *effect* on voting behavior. Congress may act to prevent the use of corporate and union treasury funds for communications having such electoral impacts, regardless of the subjective intent of the advertiser.

On the eve of a federal election, the most effective strategy for precipitating a change in government policy on a particular issue may well be to work to alter the composition of Congress rather than to lobby existing legislators to change their minds. When the objective characteristics of a particular communication indicate that it is intended at least in significant part to influence federal elections and is likely to have that effect, even clear proof of an *additional* "lobbying" purpose would not negate Congress's power to forbid the use of corporate and union treasury funds to finance that communication.[14]

2. In discussing the sorts of pre-BCRA advertisements that were intended to influence federal elections but avoided words of express advocacy, the Court in *McConnell* observed that "[l]ittle difference existed * * * between an ad that urged viewers to

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[14] As appellant explains (Br. 10-11, 24 n.19), some of BCRA's sponsors proposed, but the FEC ultimately declined to adopt, a regulatory exemption for certain communications urging members of the public to contact their elected representatives. The fact that the sponsors urged adoption of such an exemption, however, does not mean that it is constitutionally required, much less that the sponsors intended to open BCRA to as-applied challenges of the type at issue here. In any event, because the proposed regulatory exemption would have specifically excluded any communication that identified a federal candidate by name (see Appellant's Br. 24-25 n.19), it would not have encompassed the advertisements involved in this case.

'vote against Jane Doe' and one that condemned Jane Doe's record on a particular issue before exhorting viewers to 'call Jane Doe and tell her what you think.'" 540 U.S. at 126-127. The Court thus treated an appeal to citizens to contact an identified elected representative, when targeted to the relevant electorate and issued during the 30- and 60-day periods preceding federal primary and general elections, as a *paradigmatic* example of the advertisements that BCRA's "electioneering communication" provisions were intended to address. The record before the district court in *McConnell* likewise reflected the understanding of current and former Members of Congress that such advertisements were routinely used to influence electoral outcomes. See, *e.g.*, *McConnell* v. *FEC*, 251 F. Supp. 2d 176, 532-533 (D.D.C. 2003) (Kollar-Kotelly, J.).

Appellant takes pains to argue (see, *e.g.*, Br. 4 n.4, 29) that its own lobbying message was not a "sham"—*i.e.*, that appellant's opposition to the filibustering of judicial nominees is sincere. That is beside the point. A constitutional standard that turned on the subjective sincerity of a speaker's message would likely be incapable of workable application; at a minimum, it would invite costly, fact-dependent litigation. In any event, appellant's representations as to the sincerity of its views, even if taken as true, do not demonstrate the absence of a significant intent to prevent the re-election of a Senator who had engaged in the legislative conduct that appellant sincerely opposed.

Insofar as its advocacy program as a whole was concerned, appellant evidently regarded exhortations to citizens to lobby Senator Feingold as complementing the organization's effort to unseat him at the polls, since appellant aired the advertisements at issue in this case

after its own PAC had "endorsed three candidates opposing Senator Feingold and announced that the defeat of Senator Feingold was a priority." J.S. App. 5a. Just as appellant's overall advocacy program was designed to accomplish dual objectives, individual advertisements could be intended *both* to encourage citizens to contact Senator Feingold directly *and* to induce voters to cast their ballots for his opponent. Thus, when the objective characteristics of particular broadcast advertisements (*i.e.*, their reference to a clearly-identified candidate, targeting to the relevant electorate, and airing during a 30- or 60-day pre-election period) indicate an intent to influence a federal election, even strong evidence of a sincere lobbying purpose would not rebut that inference. And even if appellant could somehow demonstrate that its *sole* subjective motivation for airing a particular advertisement was to induce citizens to lobby their representatives, the prospect that the advertisement will nevertheless have a significant electoral *effect* is an appropriate subject of congressional concern. See p. 37-38, *supra*.

3. Appellant offers no basis for questioning Congress's authority to bar the use of corporate and union treasury funds to finance advertisements that are intended or that have the effect both of influencing electoral outcomes and of inducing citizens to lobby their elected representatives. Most electoral advertisements discuss issues of public importance, and "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *Buckley*, 424 U.S. at 42. This Court's decisions applying

the "express advocacy" standard, for example, do not suggest that corporate disbursements for communications that explicitly urge the election or defeat of candidates can be immunized from federal regulation through the inclusion of an additional lobbying message.[15]

4. Lobbying has no higher First Amendment status than electoral advocacy. The FECA/BCRA restrictions on the use of corporate funds to influence federal elections are not premised on any notion that "[a]dvocacy of the election or defeat of candidates * * * is * * * less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation." *McConnell*, 540 U.S. at 205 (quoting *Buckley*, 424 U.S. at 48). Rather, those provisions reflect Congress's determination that corporate "electioneering," as defined by statute, poses distinct dangers to the integrity of the electoral process that other forms of corporate advocacy do not present. See, *e.g.*, *ibid.*; *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765, 790 (1978). Application of BCRA's financing restrictions

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[15] *MCFL* involved a newsletter whose most explicit exhortation was to "VOTE PRO-LIFE." 479 U.S. at 243. That message underscores the inherent connection between issues and candidate elections where many voters view candidates as means to an end (viz., the implementation of preferred government policies on issues the voter cares about). Nonetheless, because that issue-based message was tied directly to particular candidates and their positions on the issue of abortion, the Court found that the newsletter went "beyond issue discussion to express electoral advocacy" that "falls squarely within § 441b," *id.* at 249-250. The Court thus confirmed that the presence of "issue discussion" does not immunize an election-influencing communication from regulation. Cf. *McConnell*, 540 U.S. at 123, 166 (FECA definition of "contribution" properly includes activities that simultaneously influence both federal and state elections because the influence on federal elections is an appropriate subject of congressional concern).

to corporate advertisements that have both electoral and non-electoral purposes is a necessary and appropriate means of addressing those dangers. And because communications urging citizens to contact their representatives on matters of public concern have no higher constitutional status than does pure electioneering, the "compelling" governmental interests that support regulation of corporate electoral advocacy (see *McConnell*, 540 U.S. at 205) are sufficient to justify BCRA's incidental impact on "grassroots lobbying."[16]

5. Appellant contends (Br. 20-29) that the district court's rejection of its as-applied challenge to BCRA § 203 is inconsistent with this Court's recognition, in *McConnell* and prior decisions, of a constitutional distinction between regulation of "lobbying" and regulation of "electioneering." That argument reflects a misunder-

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[16] Although the three advertisements that were the subject of appellant's original complaint can now be broadcast in Wisconsin without regard to BCRA § 203 until the next Senate election is imminent, appellant has provided no evidence that it has run such advertisements after last November's elections or that it has specific plans to do so, even though the issue discussed in the advertisements (Senate filibusters of judicial nominees) was a focus of particularly intense public interest during the spring of 2005 and remains a topic of widespread public concern. Before this Court, appellant states only that it "intends to do similar grass-roots lobbying in the future, with a reasonable likelihood that the need will recur during a prohibition period." J.S. 7; see Br. 9 n.8. That election-centered pattern of advertising is similar to the pattern that preceded and prompted Congress's passage of BCRA, see *McConnell*, 540 U.S. at 127 ("[T]he conclusion that [purported issue] ads were specifically intended to affect election results was confirmed by the fact that almost all of them aired in the 60 days immediately preceding a federal election."), and it reinforces the inference that appellant's advertisements were in the heartland of Congress's concern.

standing of the rationale for Congress's adoption of an objective bright-line rule.

The Court in *McConnell* reaffirmed the proposition, previously established in such cases as *Bellotti*, that "unusually important interests underlie the regulation of corporations' campaign-related speech." 540 U.S. at 206 n.88. Appellant is therefore correct that any federal interest in regulating corporate issue advocacy *as such* is of considerably less magnitude than is the interest in regulating corporate *campaign* spending in candidate elections. But neither Congress's adoption of a bright-line rule, nor the district court's rejection of appellant's as-applied constitutional challenge, reflects the view that regulation of corporate issue advocacy or "grass-roots lobbying" is subject to reduced constitutional scrutiny or is desirable for its own sake. Rather, any restrictions that BCRA imposes on the financing of advertisements that in fact have no electioneering purpose are simply the incidental byproduct of Congress's need to employ a bright-line rule to prevent corporate treasury funds from being used to influence federal elections. Strict scrutiny under the First Amendment requires narrow tailoring, not perfect tailoring. And, especially in light of the alternative avenues for corporations and unions to finance "electioneering communications," once this Court has upheld a bright-line rule as narrowly tailored, as it did in *McConnell*, that should resolve the matter.

Recognizing the strength of the federal interest in preventing actual or apparent electoral corruption, the need for clarity as to the range of communications subject to the financing restrictions, the futility of prior efforts to identify all relevant election-related communications through the "express advocacy" test, and the

minor burden that BCRA § 203 places upon corporate and union speakers that wish to engage in issue advocacy but do not seek to influence electoral outcomes, the Court in *McConnell* sustained that provision against constitutional attack. Thus, even if the Court were to conclude that Congress lacks a substantial *independent* interest in regulating corporate issue advocacy, the marginal impact of BCRA § 203 on such communications would not render the provision unconstitutional, either on its face or as applied.

D. Appellant's Offer To Finance The Advertisements At Issue Here From A Segregated Bank Account Does Not Alter The Constitutional Analysis

Appellant asserts (Br. 28-29) that it does "not challenge the disclaimer and disclosure requirements" for "electioneering communications." As an alternative to its request for a complete constitutional exemption from BCRA's restrictions on the financing of corporate "electioneering communications," appellant states (Br. 4 n.4, 30-32; see Amended Compl. ¶¶ 64-69) that it is "willing" if necessary to finance "electioneering communications" from a "segregated bank account" containing only funds raised from individuals. After careful deliberation, however, Congress chose to require corporations to finance "electioneering communications" through a PAC, and it specifically rejected the segregated-bank-account alternative that appellant proposes. Because the Court in *McConnell* sustained the PAC requirement as applied to nonprofit corporations, appellant has no constitutional right to utilize a "segregated bank account" instead.

1. As the Court explained in *McConnell*, the "Snowe-Jeffords" provisions of BCRA § 203 appear on their face to exempt corporations encompassed by 26

U.S.C. 501(c)(4) or 527 from BCRA's requirement that corporate "electioneering communications" be financed through a PAC. In place of the restrictions imposed by BCRA on corporate "electioneering communications" generally, the Snowe-Jeffords provisions would have substituted the requirement that Section 501(c)(4) and 527 corporations pay for such communications with funds collected solely from individuals. See *McConnell*, 540 U.S. at 209 n.90. Because a corporate PAC is subject to significant fundraising restrictions and disclosure obligations that would not have applied to Section 501(c)(4) and 527 corporations under the Snowe-Jeffords provisions, those provisions would have increased the range of financing options available to any such nonprofit corporations that wished to make "electioneering communications."[17]

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[17] Unlike appellant's PAC, the "segregated bank account" that appellant offers to utilize for "electioneering communications" could solicit funds from individuals who are not its members, see 2 U.S.C. 441b(b)(4), and it could accept contributions in amounts exceeding the $5000 annual contribution limit of 2 U.S.C. 441a(a)(1)(C). In addition, appellant's assurances that it will disclose its receipts and disbursements for the advertisements "at the level at which Congress asserted a disclosure interest" (Amended Compl. ¶ 66), and that "any donors contributing in excess of $1,000 to the [segregated] account would be disclosed to the public" (Br. 32 (quoting Amended Compl. ¶ 67)), are insufficient to achieve compliance with the disclosure requirements that the FECA/BCRA regime imposes on political committees. Under BCRA, an advertiser that is *not* a political committee must disclose "electioneering communications" for which it spends $10,000 or more, and it must disclose the identity of donors who contribute $1000 or more. See 2 U.S.C. 434(f)(1), 434(f)(2)(E) and (F). Political committees like appellant's PAC, however, are required to disclose all receipts and disbursements of $200 or more. See 2 U.S.C. 434(b)(3) and (6).

BCRA § 204, however, known as the "Wellstone Amendment," states that the Snowe-Jeffords provisions are inapplicable to "targeted communications," a term defined to include "electioneering communications." See *McConnell*, 540 U.S. at 209-210 n.90. The practical effect of the Wellstone Amendment is to render the Snowe-Jeffords provisions a nullity. See *id.* at 210 n.90. After considering the interplay between the Snowe-Jeffords provisions and the Wellstone Amendment, see *id.* at 209-210 n.90, the Court in *McConnell* held that BCRA § 204's ban on the use of a nonprofit corporation's treasury funds to finance "electioneering communications" is "plainly valid" so long as that provision is construed to exempt *MCFL* organizations. *Id.* at 211; see *id.* at 210-211.

The Wellstone Amendment thus reflects an explicit and considered congressional determination, sustained by this Court in *McConnell*, that appellant's proposed "segregated bank account" alternative affords insufficient protection against corporate electoral abuse. Appellant has chosen to reap the advantages that the corporate form entails (see, *e.g.*, *FEC* v. *Beaumont*, 539 U.S. 146, 153-154, 159-160 (2003)), and it has elected to accept money from business corporations and/or to engage in other activities that bring it outside the "carefully defined category of entities" (*McConnell*, 540 U.S. at 210) that are eligible for the *MCFL* exemption. See pp. 4, 31-33, *supra*. Under this Court's precedents, appellant therefore may validly be required to finance its "electioneering communications" through a PAC rather than through the "segregated bank account" that it would prefer to utilize.

2. By allowing appellant to finance "electioneering communications" with money raised outside the restric-

tions applicable to political committees, appellant's "segregated bank account" proposal would increase the funds available to appellant for indisputably regulable activities such as direct contributions to federal candidates and express advocacy of electoral results. Compare *California Med. Ass'n* v. *FEC*, 453 U.S. 182, 198-199 n.19 (1981) (plurality opinion) (donations "earmarked for administrative support" can be regulated as "contributions" because they free up other money to be used for more direct electoral activity). Indeed, appellant acknowledges that it objects to the requirement that the advertisements at issue here be financed through its PAC because it wishes to reserve its PAC funds for "contributions and independent expenditures." Br. 6; see 2 U.S.C. 431(17) (Supp. II 2002) defining "independent expenditure" to mean "an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate"). Appellant's proposal, however, ignores the carefully balanced set of benefits and burdens that the Act applies to political committees. See *McConnell*, 540 U.S. at 152 n.48 (limits on contributions to political committees restrict "not only the source and amount of funds available to parties and political committees to make candidate contributions, but also the source and amount of funds available to engage in express advocacy and numerous other noncoordinated expenditures").

3. Appellant acknowledges (Br. 32) that the "segregated bank account" it proposes would not be subject to all the restrictions applicable to PACs. Appellant nevertheless contends (*ibid.*) that this disparity does not matter "in the context of grass-roots lobbying because there is no potential for corruption." In other words, appel-

lant appears to contend that, even if corporate "grassroots lobbying" is not wholly immune from federal regulation, use of a "segregated bank account" is adequate to achieve BCRA's anti-corruption objectives. Appellant apparently envisions a mode of as-applied constitutional analysis in which the reviewing court will consider the content of specific corporate communications, together with the corporation's stated willingness to comply with some but not all requirements of the applicable legal regime, in order to determine whether the relevant corporate activity will actually create the dangers that BCRA is intended to prevent.

Appellant's "segregated bank account" argument represents a narrower attack on the statutory regime than does its primary theory that corporate "grassroots lobbying" is constitutionally exempt from federal regulation. As a practical matter, however, the constitutional methodology that appellant's fallback argument would entail is even less workable than a mode of review that turns on the content of the relevant advertisements standing alone. In addition to the practical difficulties created by appellant's failure to articulate a clear, objective standard for distinguishing "grassroots lobbying" from corporate electioneering (see pp. 26-35, *supra*), appellant's fallback argument would require a reviewing court to assess the relative importance to the FECA/BCRA regime of the statutory provisions that a particular corporate advertiser does and does not express a willingness to obey. It would essentially allow any corporation or union to litigate the validity of a nearly infinite range of hypothetical campaign-finance and disclosure regimes that Congress could have, but has not, enacted. Such an approach is almost certain to prove incapable of workable administration, and it would

dismantle the careful legislative balancing of interests that culminated in BCRA.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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